

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTOINE L. ARDDS,

Plaintiff,

v.

V. KIEU, C. LUNDGREN AND J.
LEVIN,

Defendants.¹

No. 2:20-cv-0133 TLN CSK P

ORDER AND FINDINGS AND
RECOMMENDATIONS

I. INTRODUCTION

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the Court is defendants' motion for summary judgment as to the second amended complaint (ECF No. 77), plaintiff's motion for appointment of counsel (ECF No. 79) and defendants' motion to strike plaintiff's sur-reply. (ECF No. 87.) This action proceeds on plaintiff's second amended complaint for Eighth Amendment claims against defendants Staff Psychologist and plaintiff's Mental Health Primary Clinician ("MHPC") Kieu, California Health Care Facility ("CHCF") Rehabilitation Therapist Lundgren and Social Worker Levin, all members of the Interdisciplinary Treatment Team ("IDTT"), for their conduct between

¹ The Clerk of the Court is directed to update the caption of this action to remove defendant Martin, who has been dismissed.

August 27, 2019 and September 11, 2019. (ECF Nos. 48, 49.)

For the following reasons, this Court recommends that defendants' summary judgment motion be granted. For the following reasons, plaintiff's motion for appointment of counsel is denied and defendants' motion to strike plaintiff's sur-reply is granted.

II. LEGAL STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is demonstrated that the standard set forth in Federal Rule of Civil Procedure 56 is met. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P. 56(c)). "Where the nonmoving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendments (recognizing that "a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact"). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

Consequently, if the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. See

1 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
2 establish the existence of such a factual dispute, the opposing party may not rely upon the
3 allegations or denials of its pleadings but is required to tender evidence of specific facts in the
4 form of affidavits, and/or admissible discovery material in support of its contention that such a
5 dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party
6 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
7 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
8 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
9 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return
10 a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436
11 (9th Cir. 1987), overruled on other grounds as stated in Flood v. Miller, 35 F. App’x 701, 703 n.3
12 (9th Cir. 2002).

13 In the endeavor to establish the existence of a factual dispute, the opposing party need not
14 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
15 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
16 trial.” T.W. Elec. Serv., 809 F.2d at 630. Thus, the “purpose of summary judgment is to ‘pierce
17 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”
18 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee’s notes to 1963
19 amendments).

20 In resolving a summary judgment motion, the court examines the pleadings, depositions,
21 answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R.
22 Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at
23 255. All reasonable inferences that may be drawn from the facts placed before the court must be
24 drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences
25 are not drawn out of the air, and it is the opposing party’s obligation to produce a factual
26 predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F.
27 Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to
28 demonstrate a genuine issue, the opposing party “must do more than simply show that there is

1 some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could
 2 not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for
 3 trial.’” Matsushita, 475 U.S. at 586 (citation omitted).

4 By order and notice filed May 22, 2023 and March 22, 2024 (ECF Nos. 59, 77-1), plaintiff
 5 was advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal
 6 Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc);
 7 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

8 **III. BACKGROUND**

9 On April 15, 2021, the Court ordered service of plaintiff’s first amended complaint (ECF
 10 No. 15) as to the following claims: 1) between August 27, 2019 and November 26, 2019,
 11 defendants Lewis, Martel, Martin, Eldridge and Kieu were deliberately indifferent to plaintiff’s
 12 serious mental health needs, and failed to protect plaintiff from a substantial risk of harm, in
 13 violation of the Eighth Amendment; 2) between August 27, 2019 and November 26, 2019,
 14 defendants Lewis, Martel, Martin, Eldridge and Kieu retaliated against plaintiff in violation of the
 15 First Amendment by removing plaintiff from necessary mental health care because plaintiff
 16 initiated and maintained misconduct complaints; 3) on September 6, 2019, defendant Lewis
 17 retaliated against plaintiff for filing civil actions and staff complaints by revealing privileged
 18 information to incite an inmate attack on plaintiff; and 4) state law negligent failure to protect
 19 claims against defendants Martel, Martin and Eldridge. (ECF No. 18.)

20 On October 22, 2021, defendants filed a motion for summary judgment on the grounds
 21 that plaintiff failed to exhaust administrative remedies as to all federal claims and that plaintiff
 22 failed to comply with the pre-suit procedural requirements for his state law claims. (ECF No. 36.)
 23 On April 28, 2022, Magistrate Judge Kendall Newman recommended that defendants’ summary
 24 judgment motion be granted as to plaintiff’s state law claims and as to all federal claims but for
 25 the Eighth Amendment claims arising from the allegations set forth in grievance no. CHCF-HC-
 26 20-000548. (ECF No. 43.²) In grievance no. CHCF-HC-20-000548, plaintiff alleged that “IDTT

27 ² For court orders and findings and recommendations referenced herein, the filing date is used to
 28 identify the document.

members...refused to provide any of the broad range of mental health services” which plaintiff alleged were unavailable “due to overcrowding and extreme staff shortages...or the increase in violence at CHCF.” (ECF No. 36-4 at 68.) In grievance no. CHCF-HC-20-000548, plaintiff stated that he had cut his neck on several occasions due to staff being overworked. (Id.) Magistrate Judge Newman recommended that plaintiff be granted leave to amend to identify the Interdisciplinary Treatment Team (“IDTT”) members identified in grievance no. CHCF-HC-20-000548 and to set forth specific factual allegations contained in that grievance. (ECF No. 43 at 24.) On July 19, 2022, District Judge Troy Nunley adopted the April 28, 2022 findings and recommendations and granted plaintiff thirty days to file a second amended complaint based on the allegations set forth in grievance no. CHCF-HC-20-000548 against only those individuals who were part of the IDTT referenced therein. (ECF No. 47.)

On August 24, 2022, plaintiff filed a second amended complaint. (ECF No. 48.) On November 21, 2022, the Court struck the claims and references to defendants Martin and Martel as not permitted by the Court’s July 19, 2022 order because these individuals were not members of the IDTT. (ECF No. 49.) The Court found that the second amended complaint stated potentially cognizable Eighth Amendment claims, limited to those exhausted through grievance no. CHCF-HC-20-000548, against defendants Kieu, Lundgren and Levin,³ members of the IDTT, for their conduct between August 27, 2019 and September 11, 2019. (Id.) The Court ordered defendant Kieu to file a responsive pleading within twenty-one days. (Id.) By separate order, the Court directed service of defendants Lundgren and Levin. (ECF No. 50.)

IV. PLAINTIFF’S CLAIMS

A. Plaintiff’s Allegations in Second Amended Complaint

As indicated above, this action proceeds on plaintiff’s second amended complaint as to plaintiff’s Eighth Amendment claims against defendants Staff Psychologist and plaintiff’s MHPC Kieu, CHCF Rehabilitation Therapist Lundgren and Social Worker Levin, members of the IDTT,

³ In the second amended complaint, plaintiff identified defendant Levin as defendant Bogacs. In the summary judgment motion, defendants state that defendant Bogacs now goes by the last name Levin. (ECF No. 77-4 at 2.) For this reason, this Court refers to defendant Bogacs as defendant Levin in these findings and recommendations.

1 for their conduct between August 27, 2019 and September 11, 2019. (ECF Nos. 48, 49.) The
2 alleged deprivations occurred at the CHCF. (ECF No. 48 at 1.)

3 Plaintiff alleges that he filed grievance no. HC-20-000548 alleging that he was denied the
4 ability to participate in a broad range of mental health services due to a shortage of staff,
5 overcrowding and an increase in violence. (Id. at 7.)

6 Plaintiff alleges that on August 29, 2019, plaintiff was transferred to CHCF Psychiatric
7 Inpatient Program (“PIP”) for placement in CHCF’s acute suicide prevention treatment program
8 for plaintiff’s ongoing suicidality. (Id.) Defendant Kieu was assigned as plaintiff’s clinician
9 upon plaintiff’s arrival at CHCF-PIP. (Id.) From August 28, 2019 through October 7, 2019,
10 plaintiff was confined in his cell without any set treatment plan from defendant Kieu. (Id.)

11 On September 11, 2019, defendant Lundgren met plaintiff at plaintiff’s cell. (Id. at 8.)
12 Plaintiff requested that he be allowed out of his cell to write letters with defendant Lundgren.
13 (Id.) Defendant Lundgren denied this request and instructed plaintiff to ask “CNA” staff. (Id.)
14 Plaintiff alleges that making such a request to “CNA” staff was prohibited. (Id.)

15 From August 28, 2019 through September 11, 2019, during each of the IDTT sessions,
16 defendant Levin told plaintiff that it was not her job to run therapeutic groups when he asked for
17 such services. (Id. at 10.)

18 **B. Plaintiff’s Legal Claims**

19 The district court’s orders limited the claims in the second amended complaint to Eighth
20 Amendment claims based on allegations set forth in grievance no. CHCF-HC-20-00548 against
21 IDTT members Kieu, Levin and Lundgren for their conduct between August 27, 2019 and
22 September 11, 2019. (ECF Nos. 43, 47, 49.) Grievance no. CHCF-HC-20-00548 is dated
23 September 12, 2019. (ECF No. 49, 36-4 at 66.) In grievance no. CHCF-HC-20-00548, plaintiff
24 claimed that defendants refused to provide plaintiff with “any of the broad range of mental health
25 services as required pursuant to Article 9 Mental Health Services Tit. 15” due to overcrowding,
26 extreme staff shortages and the increase in violence at CHCF. (ECF No. 36-4 at 66, 68.)
27 Plaintiff’s second amended complaint includes claims regarding events occurring after September
28 11, 2019. Accordingly, those claims are disregarded because they are not permitted by the

1 district court's orders. Therefore, the second amended complaint raises the following Eighth
2 Amendment claims: 1) against defendants Kieu, Levin and Lundgren for denying plaintiff access
3 to a broad range of mental health services, activities and programs due to staff shortages,
4 overcrowding and an increase in violence between August 27, 2019 and September 11, 2019;
5 2) against defendant Kieu for confining plaintiff in his cell without any set treatment plan from
6 August 27, 2019 through September 11, 2019; 3) against defendant Levin for denying plaintiff's
7 requests for therapeutic groups during IDTT meetings from August 28, 2019 through September
8 11, 2019; and 4) against defendant Lundgren for refusing to take plaintiff out of his cell on
9 September 11, 2019.

10 This Court observes that grievance no. CHCF-HC-20-00548 did not specifically raise
11 plaintiff's claims that defendant Kieu confined plaintiff in his cell without a treatment plan, that
12 defendant Levin denied plaintiff's request for therapeutic groups and that defendant Lundgren
13 refused to take plaintiff out of his cell on September 11, 2019. In an abundance of caution, this
14 Court considers these claims below. This Court also observes that though the claims permitted to
15 proceed in the second amended complaint were limited to conduct by defendants Kieu, Levin and
16 Lundgren between August 27, 2019 and September 11, 2019, defendants' summary judgment
17 motion addresses plaintiff's claims regarding events occurring after September 11, 2019,
18 apparently in an abundance of caution. Because claims regarding events occurring after
19 September 11, 2019 are not permitted to proceed based on the district court's prior orders, this
20 Court will not address these claims.

21 **V. UNDISPUTED FACTS**

22 Plaintiff did not file a response to defendants' statement of undisputed facts. Accordingly,
23 this Court finds that defendants' undisputed facts are undisputed to the extent they are supported
24 by the evidence cited. If this Court finds that the evidence cited does not support the fact, that is
25 indicated below. In organizing defendants' statement of undisputed facts, this Court uses the
26 headings listed in defendants' points and authorities. (See ECF No. 77 at 10-25.) This Court
27 will also not address defendants' undisputed facts regarding events occurring after September 11,
28 2019 unless they are relevant to the at-issue claims.

A. Undisputed Facts re: California Department of Corrections and Rehabilitation’s Mental Health Delivery Services

1. At all relevant times, plaintiff was—and still is—a state inmate in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). (ECF No. 77-2 at 2 (defendants’ statement of undisputed facts), citing ECF No. 48 (plaintiff’s second amended complaint).)

2. CDCR provides mental health services to inmate-patients at several levels of care, from basic to acute. (ECF No. 77-2 at 2, citing ECF No. 77-3 at 2 (declaration of defendant Kieu, ¶ 4).)

3. CDCR’s goal is to enable every inmate-patient to function in the least restrictive environment possible. (ECF No. 77-2 at 2, citing ECF No. 77-3 at 3 (declaration of defendant Kieu, ¶ 5), ECF No. 77-5 at 2 (declaration of defendant Lundgren, ¶ 6).)

4. CDCR’s goal is also to provide constitutionally appropriate levels of mental health treatment to mentally ill inmates under its custody. (ECF No. 77-2 at 2, citing ECF No. 77-3 at 3 (declaration of defendant Kieu, ¶ 5).)

5. Generally, mental health treatment is designed to assist an inmate-patient stabilize his symptoms with his own coping skills. (ECF No. 77-2 at 2, citing ECF No. 77-5 at 3 (declaration of defendant Lundgren, ¶ 7).)

6. Mental health treatment also seeks to help expand inmate-patients’ coping skills by adding to any existing repertoire of coping with specific symptoms (ECF No. 77-2 at 2, citing ECF No. 77-5 at 3 (declaration of defendant Lundgren, ¶ 7).)

7. Mental health treatment is most effective when one applies himself and is willing to learn new coping skills. (ECF No. 77-2 at 2, citing ECF 77-5 at 3 (declaration of defendant Lundgren, ¶ 7).)

B. Undisputed Fact re: the Psychiatric Inpatient Program at CHCF

8. CHCF is licensed by the State of California to provide twenty-four-hour-per-day services, immediately below the acute level of care that would be provided at a State Hospital. (ECF No. 77-2 at 2, citing ECF No. 77-3 at 2-3 (declaration of defendant Kieu at ¶ 5).)

1 9. CHCF Psychiatric Inpatient Program (“PIP”) is a 514-bed facility, with both an
2 Acute Treatment Program (“ATP”) and an Intermediate Treatment Program (“ITP”). (ECF No.
3 77-2 at 3, citing 77-5 at 2 (declaration of defendant Lundgren at ¶ 5).)

4 10. Inmate-patients admitted to the PIP would typically be transferred in from
5 Mental Health Crisis Beds within CDCR’s adult male institutions across California. (ECF No.
6 77-2 at 3, citing ECF No. 77-3 at 2 (declaration of defendant Kieu at ¶ 2).)

7 11. Overall, CHCF provides mental health treatment to incarcerated people who
8 have the most severe and long-term needs. (ECF No. 77-2 at 3, citing ECF No. 77-3 at 3
9 (declaration of defendant Kieu at ¶ 5).)

10 12. The PIP in particular, was designed to provide more intensive treatment for
11 patients who cannot function adequately or stabilize in an outpatient program or shorter-term
12 inpatient programs. (ECF No. 77-2 at 3, citing ECF No. 77-5 at 2 (declaration of defendant
13 Lundgren at ¶ 5).)

14 13. Prolonged time within an inpatient setting can be detrimental to one’s overall
15 mental health. (ECF No. 77-2 at 3, citing ECF No. 77-5 at 2 (declaration of defendant Lundgren
16 at ¶ 6).)

17 14. The PIP is designed to stabilize an inmate-patient’s mental health and transfer
18 him back to an outpatient setting. (ECF No. 77-2 at 3, citing 77-5 at 2-3 (declaration of defendant
19 Lundgren at ¶ 6).)

20 15. The PIP is colloquially known as a “treat and release” program. (ECF No. 77-
21 2 at 3, citing ECF No. 77-5 at 3 (declaration of defendant Lundgren at ¶ 6).)

22 16. ATP length of stay is approximately one month, during which time the
23 treatment team is to determine if an inmate-patient requires more inpatient treatment, or if he is to
24 be discharged to a lower level of care. (ECF No. 77-2 at 3, citing ECF No. 77-5 at 2 (declaration
25 of defendant Lundgren at ¶ 6).)

26 17. Plaintiff was admitted to PIP on August 27, 2019. He remained there until
27 November 6, 2019—a total of seventy-one days—when he discharged and transferred to the
28 California Medical Facility. (ECF No. 77-2 at 3-4, citing ECF No. 77-4 at 2 (declaration of

1 defendant Levin, ¶ 6.)

2 **C. The Role of the Interdisciplinary Treatment Team**

3 18. In 2019, the PIP had recently switched to a Complete Care Model, meaning
4 that an Interdisciplinary Treatment Team (“IDTT”) was responsible for delivering comprehensive
5 care for inmate-patients. (ECF No. 77-2 at 4, citing ECF No. 77-3 at 4 (declaration of defendant
6 Kieu at ¶ 11), ECF No. 77-4 at 2 (declaration of defendant Levin at ¶ 5).)

7 19. IDTTs are composed of medical, clinical and correctional staff, along with
8 involvement by the inmate-patients. (ECF No. 77-2 at 4, citing ECF No. 77-3 at 4 (declaration of
9 defendant Kieu at ¶ 11).)

10 20. From a mental health staffing perspective, each treatment team included a
11 psychiatrist, psychologist, clinical social worker and rehabilitation therapist. (ECF No. 77-2 at 4,
12 citing ECF No. 77-4 at 2 (declaration of defendant Levin at ¶ 5).)

13 21. Either the psychologist or the clinical social worker would be assigned as the
14 Mental Health Primary Clinician (“MHPC”) for the inmate-patient, depending on the patient’s
15 bed assignment. (ECF No. 77-2 at 4, citing ECF No. 77-4 at 2 (declaration of defendant Levin at
16 ¶ 5).)

17 22. If the MHPC was out of the office, the alternate psychologist or clinical social
18 worker would provide coverage, including for IDTT meetings. (ECF No. 77-2 at 4, citing ECF
19 No. 77-4 at 2 (declaration of defendant Levin at ¶ 5).)

20 23. IDTTs are vital in an inmate-patient’s care. (ECF No. 77-2 at 4, citing ECF
21 No. 77-3 at 4 (declaration of defendant Kieu at ¶ 11).)

22 24. The role of IDTTs is to plan appropriate care and treatment, gather
23 information from various disciplines to monitor patient progress, evaluate patient treatment needs
24 and changes to treatment on an ongoing basis, optimize the level of functioning of inmate-patients
25 in the least restrictive environment, and treat and supervise inmate-patients in the appropriate
26 level of care. (ECF No. 77-2 at 4, citing ECF No. 77-3 at 4 (declaration of defendant Kieu at ¶
27 11).)

28 25. The goal of IDTT members is to identify symptoms that need to be addressed

1 in treatment, identify treatment goals and evaluate effectiveness, identify barriers to meeting
2 treatment goals, review and evaluate treatment effects, plans and services to meet evolving needs,
3 and determine the most appropriate level of care. (ECF No. 77-2 at 5, citing ECF No. 77-3 at 4
4 (declaration of defendant Kieu at ¶ 11).)

5 26. Per licensing requirements for the facility, a written interdisciplinary treatment
6 plan must be developed and implemented by the IDTT for each patient as soon as possible after
7 admission in the PIP, but no later than seventy-two hours following admission. (ECF No. 77-2 at
8 5, citing ECF No. 77-3 at 4 (declaration of defendant Kieu at ¶ 11).)

9 27. IDTTs were held on a weekly basis for each inmate in the PIP. (ECF No. 77-2
10 at 5, citing ECF No. 77-4 at 3 (declaration of defendant Levin at ¶ 8).)

11 28. During the time that plaintiff was in the PIP, ten weekly IDTTs were
12 conducted. (ECF No. 77-2 at 5, citing ECF No. 77-3 at 13 (declaration of defendant Kieu at ¶
13 49); ECF No. 77-5 at 7 (declaration of defendant Lundgren at ¶ 26); ECF No. 77-4 at 5
14 (declaration of defendant Levin at ¶ 14).)

15 **D. Plaintiff's Mental Health Background**

16 29. Prior to being received in the PIP, plaintiff was in a Mental Health Crisis Bed
17 at a different institution, where his symptoms had not stabilized. (ECF No. 77-2 at 6, citing ECF
18 No. 77-3 at 3 (declaration of defendant Kieu at ¶ 8).)

19 30. At the prior institution, plaintiff made conditional threats to cut his throat if he
20 was not transferred to a higher level of care. (ECF No. 77-2 at 6, citing ECF No. 77-3 at 3
21 (declaration of defendant Kieu at ¶ 8).)

22 31. While housed at California State Prison-Corcoran on or around July 2, 2018,
23 plaintiff was diagnosed with Unspecified Depressive Disorder and Borderline Personality
24 Disorder. (ECF No. 77-2 at 6, citing ECF No. 77-5 at 75 (plaintiff's medical/mental health
25 records).)

26 32. Plaintiff was admitted to the PIP for suicidal ideation, suicide gestures and
27 suicide attempts. (ECF No. 77-2 at 6, citing ECF No. 77-3 at 3 (declaration of defendant Kieu at
28 ¶ 7); ECF No. 77-5 at 85 (plaintiff's medical/mental health records).)

1 33. Plaintiff's mental health records denote a history of parasuicidal behavior (i.e.,
2 an apparent attempt at suicide, commonly called a suicidal gesture, in which the aim is not death)
3 for secondary gain. (ECF No. 77-2 at 6, citing ECF No. 77-3 at 4 (declaration of defendant Kieu
4 at ¶ 10); ECF No. 77-5 at 90 (plaintiff's medical/mental health records).)

5 34. Plaintiff was also noted to have a history of making paranoid and delusional
6 statements about custody staff, as well as a history of suicidal ideation with the goal to manipulate
7 and control. (ECF No. 77-2 at 6, citing ECF No. 77-3 at 4 (declaration of defendant Kieu at ¶
8 10); ECF No. 77-5 at 90 (plaintiff's medical/mental health records).)

9 **E. Mental Health Treatment Available to Plaintiff in the PIP**

10 35. The expectation for plaintiff's treatment in the PIP was that he would achieve
11 baseline functioning to program safely and effectively at his appropriate level of care while
12 maintaining treatment compliance. (ECF No. 77-2 at 6, citing ECF No. 77-3 at 5 (declaration of
13 defendant Kieu at ¶ 15).)

14 36. In undisputed fact no. 36, defendants refer to paragraph 3 of defendant Kieu's
15 declaration for the statement that, "Generally speaking, plaintiff had access to psychotherapy,
16 milieu therapy, crisis management, group therapy, in-cell coping activities, psychotropic
17 medications, and regular access to his mental health treatment team, including during weekly
18 IDTTs." (ECF No. 77-2 at 6-7). Paragraph 3 of defendant Kieu's declaration does not contain all
19 of the information alleged in undisputed fact no. 3. Accordingly, this Court finds that it is
20 undisputed that plaintiff generally had access to those programs identified in paragraph 3 of
21 defendant Kieu's declaration: positive Behavior Intervention Plans, milieu therapy, crisis
22 management therapy, group therapy, and daily and weekly IDTT meetings to monitor inmate-
23 patient progress as implemented on treatment care plans. (ECF No. 77-3 at 2.)

24 37. Therapeutic leisure groups are supervised recreational activities to reduce
25 stress, improve self-esteem, foster interpersonal interactions, and promote the constructive use of
26 leisure time by focusing on themes such as daily living skills, symptom management, focused
27 mental health issues, social skills, anger management, stress management, substance use, offense-
28 specific groups, family issues, and rational behavior/reality decision making. (ECF No. 77-2 at 7,

1 citing ECF No. 77-5 at 2 (declaration of defendant Lundgren at ¶ 5).)

2 38. There is no pre-determined amount of groups or activities that inmate-patients
3 in the PIP must receive; treatment is customized to the specific needs of each inmate patient.
4 (ECF No. 77-2 at 7, citing ECF No. 77-3 at 13 (declaration of defendant Kieu at ¶ 47).)

5 39. Participation in the therapeutic groups is determined by the inmate-patients'
6 safety risks. (ECF No. 77-2 at 7, citing ECF No. 77-5 at 2 (declaration of defendant Lundgren at
7 ¶ 4).)

8 40. Typically, inmate-patients who endorse suicidal ideation, suicide attempts, or
9 threaten staff, are not removed from their cells to attend groups. (ECF No. 77-2 at 7, citing ECF
10 No. 77-5 at 2 (declaration of defendant Lundgren at ¶ 4).)

11 41. Instead, their participation in groups, as well as increased privileges and
12 activities, is based on demonstrated progress and compliance with the treatment plan. (ECF No.
13 77-2 at 7, citing ECF No. 77-5 at 2 (declaration of defendant Lundgren at ¶ 4).)

14 42. At a minimum, and as appropriate, suicidal inmate-patients are provided in-
15 cell materials to encourage positive recreational time. (ECF No. 77-2 at 7, citing ECF No. 77-5 at
16 2 (declaration of defendant Lundgren at ¶ 4).)

17 **F. Defendants' Roles in Plaintiff's Mental Health Treatment**

18 **1. Defendant Kieu**

19 *a. Background*

20 43. Defendant Kieu was a staff psychologist and plaintiff's MHPC.
21 (ECF No. 77-2 at 8, citing ECF No. 77-3 at 1 (declaration of defendant Kieu at ¶ 2).)

22 44. In that position, defendant Kieu managed and oversaw clinical care with a
23 multidisciplinary team on the institution's PIP for inmate-patients transferred from Mental Health
24 Crisis Beds at other institutions. (ECF No. 77-2 at 8, citing ECF No. 77-3 at 1-2 (declaration of
25 defendant Kieu at ¶ 2).)

26 45. Defendant Kieu attended nine of the ten IDTTs held while plaintiff was in the
27 PIP. (ECF No. 77-2 at 8, citing ECF No. 77-3 at 13-14 (declaration of defendant Kieu at ¶¶ 49-
28 50).)

b. Defendant Kieu's Interactions with Plaintiff

46. Defendant Kieu performed plaintiff's initial intake assessment on August 29, 2019. (ECF No. 77-2 at 8, citing ECF No. 77-3 at 4 (declaration of defendant Kieu at ¶ 10); ECF No. 77-5 at ECF Nos. 121-122 (plaintiff's medical/mental health records).)

47. Defendant Kieu noted that, upon his arrival in the PIP two days earlier, plaintiff refused all medical assessment, including vital signs. (ECF No. 77-2 at 8, citing ECF No. 77-3 at 3 (declaration of defendant Kieu at ¶ 7); ECF No. 77-5 at 22 (plaintiff's medical/mental health records reflecting that plaintiff "refused all PMU assessment including vital signs.").)

48. In the evening hours of August 27, 2019, plaintiff appeared to have engaged in self-injurious behavior by way of opening an old wound to his neck, with no active bleeding. (ECF No. 77-2 at 8, citing ECF No. 77-3 at 3 (declaration of defendant Kieu at ¶ 7); ECF No. 77-5 at 55-56 (plaintiff's medical/mental health records).)

49. During his second day in the PIP, on August 28, 2019, plaintiff refused his psychotropic medication and his statements to staff members were indicative of his overall stay in the PIP: "[I'm going to] get what I want[.] [I've] been here before. On 1A they did everything I said. I'll do what I gotta do." (ECF No. 77-2 at 8, citing ECF No. ECF No. 77-3 at 3 (declaration of defendant Kieu at ¶ 9); ECF No. 77-5 at 55 (plaintiff's medical/mental health records).)

50. Defendant Kieu developed plaintiff's initial master treatment plan. (ECF No. 77-2 at 9, citing ECF No. 77-3 at 4 (declaration of defendant Kieu at ¶ 13); ECF No. 77-5 at 70-80 (plaintiff's master treatment plan dated August 29, 2019).)

51. During the initial IDTT meeting, held on August 29, 2019 and attended by defendants Lieu, Lundgren and Levin, a nurse and plaintiff, the goals for treatment were discussed, as well as program expectations, treatment opportunities, medications and IDTT schedule. (ECF No. 77-2 at 9, citing ECF No. 77-3 at 4-5 (declaration of defendant Kieu at ¶ 13); ECF No. 77-5 at 71 (plaintiff's medical/mental health records).)

52. During the initial IDTT meeting, plaintiff was irritable and began making demands, such as being moved to another cell and instructing staff how to administer medication

1 to him. (ECF No. 77-2 at 9, citing ECF No. 77-3 at 5 (declaration of defendant Kieu at ¶ 13);
2 ECF No. 77-5 at 71 (plaintiff's medical/mental health records).)

3 53. In her records from August 29, 2019, defendant Kieu wrote that plaintiff has a
4 schema in which he externalizes blame and responsibility. (ECF No. 77-2 at 9, citing ECF No.
5 77-3 at 5 (declaration of defendant Kieu at ¶ 14); ECF No. 77-5 at 76 (plaintiff's medical/mental
6 health records).)

7 54. In her records from August 29, 2019, defendant Kieu wrote that when this
8 schema is threatened or challenged, plaintiff lashes out at those individuals, more often through
9 litigation. (ECF No. 77-2 at 9, citing ECF No. 77-3 at 5 (declaration of defendant Kieu at ¶ 14);
10 ECF No. 77-5 at 76 (plaintiff's medical/mental health records).)

11 55. In her records from August 29, 2019, defendant Kieu also wrote that plaintiff
12 had ongoing lawsuits against several CDCR members for what he described as "mistreatment and
13 harassment." (ECF No. 77-2 at 9, citing ECF No. 77-3 at 5 (declaration of defendant Kieu at
14 ¶ 14); ECF No. 77-5 at 76 (plaintiff's medical/mental health records).)

15 56. In her records from August 29, 2019, defendant Kieu wrote that plaintiff has
16 low distress tolerance and self-harm is his primary means of relief, with over fifteen suicide
17 attempts before August 2019—either as stress relief or to achieve personal goals. (ECF No. 77-2
18 at 9, citing ECF No. 77-3 at 5 (declaration of defendant Kieu at ¶ 14); ECF No. 77-5 at 76
19 (plaintiff's medical/mental health records).)

20 57. The expectation for plaintiff's treatment in the PIP was that plaintiff would
21 achieve baseline functioning to program safely and effectively at his appropriate level of care
22 while maintaining treatment compliance. As part of this, it was expected that plaintiff would
23 participate in all treatment, including individual counseling, group therapy and medication
24 compliance. (ECF No. 77-2 at 10, citing ECF No. 77-3 at 5 (declaration of defendant Kieu at
25 ¶ 15); ECF No. 77-5 at 80 (plaintiff's medical/mental health records).)

26 58. The specific treatment goals were: (1) not engage in self-injurious behavior or
27 suicide attempts for at least four consecutive weeks; (2) not endorse suicide ideation for at least
28 two consecutive weeks; (3) continue taking medications as prescribed for at least thirty

1 consecutive days; (4) learn to utilize effectively at least two distress tolerance skills and
2 mindfulness skills; and (5) learn to utilize at least two alternative behaviors for self-injurious
3 behaviors. (ECF No. 77-2 at 10, citing ECF No. 77-3 at 5 (declaration of defendant Kieu at ¶ 15);
4 ECF No. 77-5 at 80 (plaintiff's medical/mental health records).)

5 59. At the second IDTT, on September 4, 2019, plaintiff was argumentative and
6 refused to respond to questions relevant to the topics being discussed by the treatment team.
7 (ECF No. 77-2 at 10, citing ECF No. 77-3 at 5-6 (declaration of defendant Kieu at ¶ 17); ECF No.
8 77-5 at 154-55 (plaintiff's medical/mental health records).)

9 60. At the second IDTT meeting, on September 4, 2019, plaintiff claimed that he
10 tried to cut his throat with something the day before, but no skin breakdown was noted to the neck
11 area. (ECF No. 77-2 at 10, citing ECF No. 77-3 at 5-6 (declaration of defendant Kieu at ¶ 17);
12 ECF No. 77-5 at 154 (plaintiff's medical/mental health records).)

13 61. At the second IDTT meeting, on September 4, 2019, plaintiff stated that he
14 does not want to take his Buspar (prescribed to treat anxiety) because it is crushed. (ECF No. 77-
15 2 at 10, citing ECF No. 77-5 at 154 (plaintiff's medical/medical record).)

16 Defendants' undisputed fact no. 61 and defendant Kieu's declaration state that
17 plaintiff admitted to not complying with his psychotropic medication regimen, specifically
18 Buspar. (ECF No. 77-2 at 10; ECF No. 77-3 at 6.) The record from the September 4, 2019 IDTT
19 meeting state that plaintiff stated that "he does not want to take his Buspar because it is crushed."
20 (ECF No. 77-5 at 154). It is unclear from plaintiff's mental health record whether plaintiff told
21 the IDTT that he was refusing to take Buspar. For this reason, this Court cites the entry in
22 plaintiff's mental health record.

23 62. After the September 4, 2019 IDTT meeting, plaintiff stated to one of the staff
24 members, "[I am] getting off orientation today and gonna get all my shit back...they are gonna
25 have to program me because [I'm] a legal paper pusher." (ECF No. 77-2 at 10-11, citing ECF
26 No. 77-3 at 6 (declaration of defendant Kieu at ¶ 17); ECF No. 77-5 at 151 (plaintiff's
27 medical/mental health records).)

28 63. On September 4, 2019, during a separate confidential session with defendant

1 Kieu, plaintiff stated, “I know you try to do your best but the staff here are not doing their jobs.”
2 (ECF No. 77-2 at 11, citing ECF No. 77-3 at 6 (declaration of defendant Kieu at ¶ 18); ECF No.
3 77-5 at 182 (plaintiff’s medical/mental health records).)

4 64. Plaintiff saw himself as an advocate for other inmate-patients and for the
5 “bigger picture of mental health.” (ECF No. 77-2 at 11, citing ECF No. 77-3 at 6 (declaration of
6 defendant Kieu at ¶ 18); ECF No. 77-5 at 182 (plaintiff’s medical/mental health records).)

7 65. On September 6, 2019, plaintiff remained on one-on-one enhanced
8 observation due to reported suicidal ideation. (ECF No. 77-2 at 11, citing ECF No. 77-3 at 6
9 (declaration of defendant Kieu at ¶ 19); ECF No. 77-5 at 120 (plaintiff’s medical/mental health
10 records).)

11 66. Plaintiff’s access to objects he could use to harm himself was strictly limited
12 since he was admitted to the PIP, until he could demonstrate stable and appropriate behaviors.
13 (ECF No. 77-2 at 11, citing ECF No. 77-3 at 6 (declaration of defendant Kieu at ¶ 19); ECF No.
14 77-5 at 120 (plaintiff’s medical/mental health records).)

15 67. The goal was to allow plaintiff increased privileges commensurate with his
16 demonstrated ability to maintain his personal safety. (ECF No. 77-2 at 11, citing ECF No. 77-3 at
17 6 (declaration of defendant Kieu at ¶ 19); ECF No. 77-5 at 120 (plaintiff’s medical/mental health
18 records).)

19 68. In her records from the September 4, 2019 session with plaintiff, defendant
20 Kieu noted the following goals for the treatment team:

21 Specifically, treatment team will focus on exploring psychological
22 pain (hurt, stress) and overall reduction of depressive and anxiety
23 symptoms, through the use of CBT intervention techniques, and
24 psychoeducation in individual and group treatment. Treatment team
25 will assist him with gaining insight into his mental health symptoms,
26 the specific triggers leading to increased symptom reporting,
27 identifying his behavior response patterns, and the development of
28 various coping strategies. Treatment team will assist him with
building upon protective factors such as maintaining health and
regular contact with family via phone call and letters, encourage him
to develop a regular exercise to incorporate into his daily routine, and
help him identify reasons to live, [and] personal values that can be
utilized to develop specific goals meaningful to him. Treatment team
will discuss with [plaintiff] ways to recognize changes in his
thoughts and mood that indicate[] a crisis may be developing and

1 encouraged him to speak to staff when feel[ing] distressed and
2 unsafe.

3 (ECF No. 77-2 at 11-12, citing ECF No. 77-5 at 120 (plaintiff's medical/mental health records).)

4 69. During a confidential meeting on September 10, 2019, plaintiff again re-
5 assured defendant Kieu that he would be non-compliant with his psychotropic medication
6 regimen and continued to talk nonstop about perceived issues related to program, policy and
7 staffing. (ECF No. 77-2 at 12, citing ECF No. 77-3 at 6 (declaration of defendant Kieu); ECF No.
8 77-5 at 202-03 (plaintiff's medical/mental health records).)

9 This Court notes that in her notes from the September 10, 2019 meeting, defendant
10 Kieu wrote, "Patient also expressed his frustration towards his Buspar being crushed and floated,
11 stating that, 'It's violated policy, caused health risk, tear my esophagus. Unless you do it the right
12 way, I'm not taking it.'" (ECF No. 77-5 at 202.)

13 70. During the third IDTT meeting on September 11, 2019, plaintiff remained
14 preoccupied with program and policy, focusing on staffing issues and other patients while
15 threatening to submit administrative grievances against staff members; he did not answer
16 questions about treatment goals. (ECF No. 77-2 at 12, citing ECF No. 77-3 at 7 (declaration of
17 defendant Kieu at ¶ 21); ECF 77-5 at 217 (plaintiff's medical/mental health records).)

18 71. Although plaintiff expressed a desire to participate in group programming, he
19 could not commit to maintain his own safety if he was given access to materials which he could
20 use to harm himself. (ECF No. 77-2 at 12, citing 77-3 at 7 (declaration of defendant Kieu at
21 ¶ 21); ECF No. 77-5 at 217 (plaintiff's medical/mental health records).)

22 72. Plaintiff was continued on one-on-one observations. (ECF No. 77-2 at 12,
23 citing ECF No. 77-3 at 7 (declaration of defendant Kieu at ¶ 21)).

24 73. On September 11, 2019, plaintiff's psychiatrist noted that plaintiff would be
25 monitored for "possible exaggerated symptoms." (ECF No. 77-2 at 12, citing ECF No. 77-3 at 7
26 (declaration of defendant Kieu at ¶ 22); ECF No. 77-5 at 238 (plaintiff's medical/mental health
27 records).)

28 ////

c. Defendant Kieu's Assessment of Plaintiff's Time in the PIP

137. Overall, during his time in the PIP, plaintiff received daily MHPC treatment, as well as continued medication monitoring. (ECF No. 77-2 at 21, citing ECF No. 77-3 at 13 (declaration of defendant Kieu at ¶ 47).)

138. In undisputed fact no. 138, defendants state that during the first half of his treatment, plaintiff remained on one-on-one observations in a safety smock, since he persistently stated that he experienced suicidal ideation and did not feel safe. (ECF No. 77-2 at 22, citing ECF No. 77-3 at 13 (declaration of defendant Kieu at ¶ 47)). This statement is not accurate because defendants presented evidence that plaintiff was removed from one-on-one status on or around September 17, 2019 and given prison blues to replace the safety smock on September 18, 2019. (See declaration of defendant Kieu at ¶28, ¶ 29 (ECF No. 77-3 at 8).) Plaintiff transferred away from the PIP to the California Medical Facility on November 6, 2019. (See undisputed fact no. 17).

139. When plaintiff was on suicide watch, it was because he presented a severe suicide risk and his safety was most important at that time. (ECF No. 77-2 at 22, citing ECF No. 77-3 at 13 (declaration of defendant Kieu at ¶ 47).)

140. In addition, plaintiff engaged in several self-injurious incidents on August 27, September 2, September 13 and September 17, 2019. (ECF No. 77-2 at 22, citing ECF No. 77-3 at 13 (declaration of defendant Kieu at ¶ 47); ECF No. 77-5 at 482 (plaintiff's medical/mental health records).)

2. Defendant Lundgren

a. Background

144. During the relevant times of this lawsuit, defendant Lundgren was a Rehabilitation Therapist at CHCF. (ECF No. 77-2 at 22, citing ECF No. 77-5 at 1 (declaration of defendant Lundgren at ¶ 2).)

145. Among other things, defendant Lundgren conducted therapeutic leisure groups to give inmate-patients the opportunity to socialize, learn appropriate competitiveness, exercise cognitive abilities, learn to problem-solve, and reduce or eliminate effects of mental

1 health issues. (ECF No. 77-2 at 22, citing ECF No. 77-5 at 2 (declaration of defendant Lundgren
2 at ¶ 3).)

3 146. Defendant Lundgren attended six of the total ten IDTTs held while plaintiff
4 was in the PIP. (ECF No. 77-2 at 22, citing ECF No. 77-5 at 7 (declaration of defendant
5 Lundgren at ¶ 26).)

6 *b. Defendant Lundgren's Interactions with Plaintiff*

7 147. Defendant Lundgren's first interaction with plaintiff was during the initial
8 IDTT on August 29, 2019. (ECF No. 77-2 at 23, citing ECF No. 77-5 at 3 (declaration of
9 defendant Lundgren at ¶ 11); ECF No. 77-5 at 70 (plaintiff's medical/mental health records).)

10 148. On August 30, 2019, defendant Lundgren performed her initial
11 Rehabilitation Therapy assessment of plaintiff; plaintiff indicated he was a "jailhouse lawyer."
12 (ECF No. 77-2 at 23, citing ECF No. 77-5 at 3 (declaration of defendant Lundgren at ¶ 11); ECF
13 No. 77-5 at 128 (plaintiff's medical/mental health records).)

14 149. During the August 30, 2019 assessment, plaintiff indicated that he wanted to
15 help identify his triggers, which he described as, "Misconceptions, disrespect, custody. Anyone
16 thinking [they're] better than me." (ECF No. 77-2 at 23, citing ECF No. 77-5 at 3-4 (declaration
17 of defendant Lundgren at ¶ 11); ECF No. 77-5 at 129 (plaintiff's medical/mental health records).)

18 150. Defendant Lundgren noted that plaintiff may have had safety concerns at his
19 prior institution, which could have been a motivating factor for him to remain in the PIP. (ECF
20 No. 77-2 at 23, citing ECF No. 77-5 at 4 (declaration of defendant Lundgren at ¶ 11); ECF No.
21 77-5 at 129 (plaintiff's medical/mental health records).)

22 151. From a Rehabilitation Therapy perspective, defendant Lundgren noted in the
23 record from the August 30, 2019 assessment that the goal was for plaintiff to engage in at least
24 two leisure or coping skills to manage stress by the following weekly IDTT. (ECF No. 77-2 at
25 23, citing ECF No. 77-5 at 5 (declaration of defendant Lundgren at ¶ 11); ECF No. 77-5 at 85
26 (plaintiff's medical/mental health records).)

27 152. On September 10, 2019, defendant Lundgren saw plaintiff again and noted
28 that he remained on one-on-one observation due to ongoing claims of being suicidal. (ECF No.

1 77-2 at 23, citing ECF No. 77-5 at 4 (declaration of defendant Lundgren at ¶ 12); ECF No. 77-5 at
2 198 (plaintiff's medical/mental health records).)

3 153. On September 10, 2019, plaintiff demanded specific in-cell materials and
4 was provided with a folder of puzzles by defendant Lundgren. (ECF No. 77-2 at 23, citing ECF
5 No. 77-5 at 4 (declaration of defendant Lundgren at ¶ 12); ECF No. 77-5 at 198 (plaintiff's
6 medical/mental health records).)

7 154. A staff member noted that plaintiff did not demonstrate any genuine attempts
8 to be removed from one-on-one observation so he could start attending therapeutic groups. (ECF
9 No. 77-2 at 23, citing ECF No. 77-5 at 4 (declaration of defendant Lundgren at ¶ 12); ECF No.
10 77-5 at 198 (plaintiff's medical/mental health records).)

11 This Court observes that in her declaration, defendant Lundgren states that another
12 staff member noted that plaintiff did not demonstrate any genuine attempts to be removed from
13 on-on-one. (ECF No. 77-4 at 4.) However, it appears that defendant Lundgren electronically
14 signed the record containing this statement on September 11, 2019. (ECF No. 77-5 at 198.)

15 155. On September 11, 2019, defendant Lundgren checked on plaintiff and the
16 availability of in-cell coping materials. Plaintiff was hostile. (ECF No. 77-2 at 24, citing ECF
17 No. 77-5 at 4 (declaration of defendant Lundgren at ¶ 13); ECF No. 77-5 at 210-11 (plaintiff's
18 medical/mental health records).)

19 156. On the one hand, plaintiff stated that he wanted to come out of his cell for
20 group therapy. (ECF No. 77-2 at 24, citing ECF No. 77-5 at 4 (declaration of defendant
21 Lundgren at ¶ 13); ECF No. 77-5 at 211 (plaintiff's medical/mental health records).)

22 157. On the other hand, referring to one-on-one observation, plaintiff stated, "I
23 need it. I need it so staff doesn't come into my cell." (ECF No. 77-2 at 24, citing ECF No. 77-5
24 at 4 (declaration of defendant Lundgren at ¶ 13); ECF No. 77-5 at 211 (plaintiff's medical/mental
25 health records).)

26 158. During the weekly IDTT meeting on September 11, 2019, plaintiff kept
27 interrupting members of the treatment team and was argumentative. (ECF No. 77-2 at 24, citing
28 ECF No. 77-5 at 4 (declaration of defendant Lundgren at ¶ 13); ECF No. 77-5 at 211 (plaintiff's

1 medical/mental health records).)

2 3. Defendant Levin

3 *a. Background*

4 188. In 2019, defendant Levin's last name was Bogacs and she worked as a
5 Clinical Social Worker. (ECF No. 77-2 at 28, citing ECF No. 77-4 at 2 (declaration of defendant
6 Levin at ¶ 3).)

7 189. Defendant Levin was never assigned plaintiff's MHPC. (ECF No. 77-2 at
8 28, citing ECF No. 77-4 at 3 (declaration of defendant Levin at ¶ 7).)

9 190. Defendant Levin's sole involvement in the allegations at issue in this lawsuit
10 was her participation in most (but not all) weekly IDTTs—specifically, updating treatment plans,
11 and documenting plaintiff's responses to questionnaires and questions during IDTTs. (ECF No.
12 77-2 at 28, citing ECF No. 77-4 at 3 (declaration of defendant Levin at ¶¶ 7-8).)

13 191. Defendant Levin attended eight of the ten weekly IDTTs and her interactions
14 with plaintiff were limited to seeing him during weekly IDTTs. (ECF No. 77-2 at 28, citing ECF
15 No. 77-4 at 5 (declaration of defendant Levin at ¶¶ 14-15).)

16 *b. Defendant Levin's Interactions with Plaintiff*

17 192. Defendant Levin first met plaintiff on August 29, 2019 during the initial
18 IDTT. (ECF No. 77-2 at 28, citing ECF No. 77-4 at 3 (declaration of defendant Levin at ¶ 9);
19 ECF No. 77-5 at 70 (plaintiff's medical/mental health records).)

20 193. Defendant Levin documented some of the statements made by plaintiff
21 during the first August 29, 2019 IDTT. For instance, plaintiff stated, "Once I get agitated, this is
22 fair notice, I start to dismantle shit." (ECF No. 77-2 at 29, citing ECF No. 77-4 at 3 (declaration
23 of defendant Levin at ¶ 9); ECF No. 77-5 at 81 (plaintiff's medical/mental health records).)

24 194. In her notes from the August 29, 2019 IDTT, defendant Levin noted that
25 plaintiff was on enhanced one-on-one observation due to self-injurious behavior. (ECF No. 77-2
26 at 29, citing ECF No. 77-4 at 3 (declaration of defendant Levin at ¶ 9); ECF No. 77-5 at 81
27 (plaintiff's medical/mental health records).)

28 195. The second time defendant Levin saw plaintiff was during the IDTT on

1 September 11, 2019. Similar to the initial IDTT, plaintiff was irritable and argumentative. (ECF
2 No. 77-2 at 29, citing ECF No. 77-4 at 3 (declaration of defendant Levin at ¶ 10); ECF No. 77-5
3 at 214 (plaintiff's medical/mental health records).)

4 196. At the second IDTT, plaintiff frequently interrupted the treatment team
5 members, evaded questions and continued to shift focus away from his own mental health
6 treatment to perceived systemic issues. (ECF No. 77-2 at 29, citing ECF No. 77-4 at 3
7 (declaration of defendant Levin at ¶ 10); ECF No. 77-5 at 214 (plaintiff's medical/mental health
8 records).)

9 197. At the second IDTT, plaintiff indicated he had recently cut his neck using a
10 staple and voiced overall dissatisfaction with his treatment, saying he was spending too much
11 time inside the cell. (ECF No. 77-2 at 29, citing ECF No. 77-4 at 3 (declaration of defendant
12 Levin at ¶ 10); ECF No. 77-5 at 214 (plaintiff's medical/mental health records).)

13 198. At the second IDTT, although plaintiff was requesting to participate in group
14 programming, where he would have had access to materials he could use for more self-harm, he
15 was unable to make a commitment to personal safety. (ECF No. 77-2 at 29, citing ECF No. 77-4
16 at 3-4 (declaration of defendant Levin at ¶ 10); ECF No. 77-5 at 214 (plaintiff's medical/mental
17 health records).)

18 199. At the second IDTT meeting, plaintiff reported ongoing, persistent suicidal
19 ideation. (ECF No. 77-2 at 29, citing ECF No. 77-4 at 4 (declaration of defendant Levin at ¶ 10);
20 ECF No. 77-5 at 214 (plaintiff's medical/mental health records).)

21 200. At the second IDTT meeting, plaintiff asked defendant Levin, "What are you
22 supposed to do for me?" When she attempted to explain her role on the treatment team, plaintiff
23 cut her off. (ECF No. 77-2 at 30, citing ECF No. 77-4 at 4 (declaration of defendant Levin at
24 ¶ 10); ECF No. 77-5 at 214 (plaintiff's medical/mental health records).)

25 201. At the second IDTT meeting, defendant Levin offered plaintiff in-cell coping
26 skills worksheets, to which plaintiff responded, "Is that supposed to be good enough?" Plaintiff
27 refused the offer of in-cell materials. (ECF No. 77-2 at 30, citing ECF No. 77-4 at 4 (declaration
28 of defendant Levin at ¶ 10); ECF No. 77-5 at 214 (plaintiff's medical/mental health records).)

VI. DISCUSSION OF DEFENDANTS' SUMMARY JUDGMENT MOTION

A. Legal Standard for Eighth Amendment Claim

The Constitution requires prison officials to provide inmates with reasonably adequate medical and mental health care. See Estelle v. Gamble, 429 U.S. 97, 103 (1976). To hold an official liable for violating this duty under the Eighth Amendment, the inmate must satisfy two prongs, an objective prong and subjective prong. First, the inmate must suffer from a serious medical or mental health need (the objective prong); and second, the official must be deliberately indifferent to the inmate's serious medical or mental health need (the subjective prong). See Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012), overruled in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th Cir. 2014); Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012). A medical or mental health need is "serious" if the failure to treat "could result in further significant injury or the unnecessary and wanton infliction of pain." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations omitted). The "second prong—defendant's response to the need was deliberately indifferent—is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." Id. (internal citations omitted). This standard requires that the prison official must not only "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," but that person "must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). This "subjective approach" focuses only "on what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be)..." Farmer, 511 U.S. at 839. Deliberate indifference is a higher standard than medical negligence or malpractice, and a difference of opinion between medical professionals—or between a physician and the prisoner—generally does not amount to deliberate indifference. See Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004); Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996), overruled in part on other grounds by Peralta v. Dillard, 744 F.3d 1076 (9th Cir. 2014) (en banc) (A mere "difference of medical opinion ... [is] insufficient, as a matter of law, to establish deliberate indifference."). To prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the chosen course of treatment "was medically unacceptable under the

1 circumstances,” and was chosen “in conscious disregard of an excessive risk to [the prisoner’s]
2 health.” Jackson, 90 F.3d at 332.

3 Neither will an “inadvertent failure to provide medical care” sustain a claim. See Estelle,
4 429 U.S. at 105. Misdiagnosis alone is not a basis for a claim, see Wilhelm, 680 F.3d at 1123,
5 and a “mere delay” in treatment, “without more, is insufficient to state a claim of deliberate
6 medical indifference,” Shapley v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th
7 Cir. 1985). Instead, a prisoner must show that a delay “would cause significant harm and that
8 defendants should have known this to be the case.” Hallett v. Morgan, 296 F.3d 732, 746 (9th
9 Cir. 2002).

10 **B. Defendants’ Arguments**

11 In the summary judgment motion, defendants acknowledge the legal claims this Court
12 identified above: 1) plaintiff was denied mental health services due to understaffing,
13 overcrowding and an increase in violence between August 27, 2019 and September 11, 2019;
14 2) from August 27, 2019 to September 11, 2019, plaintiff was confined in his cell without any set
15 treatment plan by defendant Kieu; 3) on September 11, 2019, defendant Lundgren denied
16 plaintiff’s requests to come out of his cell; and 4) during the IDTT sessions between August 28,
17 2019 and September 11, 2019, when plaintiff requested access to therapeutic groups, defendant
18 Levin told plaintiff that it was not her job to conduct such groups. (Defs. MSJ at 2, ECF No. 77.)
19 In the section of the summary judgment motion addressing plaintiff’s claims, defendants
20 specifically address the following claims: 1) defendant Kieu failed to prepare a set treatment plan
21 for plaintiff; and 2) defendant Levin denied plaintiff’s requests for therapeutic groups during
22 IDTT meetings. (Defs. MSJ at 21-22, ECF No. 77.) Defendants generally argue that plaintiff
23 was not denied access to adequate mental health treatment. (Defs. MSJ at 21-22, ECF No. 77.)

24 This Court next sets forth defendants’ arguments in support of their summary judgment
25 motion. Defendants argue that the undisputed evidence demonstrates that defendant Kieu
26 prepared a set treatment plan for plaintiff, along with clear goals and expectations, two days after
27 plaintiff arrived in the PIP. (Defs. MSJ at 21, citing undisputed facts nos. 50-51 and 57-58, ECF
28 No. 77.) Defendants argue that the initial master plan was comprehensive, but not static. The

1 plan was updated regularly, after each weekly IDTT. (Defs. MSJ at 21, citing undisputed facts
2 nos. 28, 51, 59, 70, ECF No. 77.) Plaintiff's treatment was dependent on plaintiff's active
3 participation and cooperation with his treatment team and demonstrated progress toward meeting
4 treatment goals. (Defs. MSJ at 21, citing undisputed facts nos. 19, 38-41, ECF No. 77.) There is
5 no pre-determined amount of therapeutic groups or activities that plaintiff had to receive; rather,
6 treatment was customized to plaintiff's specific needs and progress. (Defs. MSJ at 21, citing
7 undisputed facts nos. 38, 41, ECF No. 77.) Plaintiff had access to milieu therapy, crisis
8 management, group therapy, psychotropic medication, and daily MHPC treatment and weekly
9 IDTT meetings. (Defs. MSJ at 21, citing undisputed facts nos. 36, 137, ECF No. 77.) At the
10 second IDTT, on September 4, 2019, plaintiff was argumentative and refused to respond to
11 questions relevant to the topics being discussed by the treatment team. (Defs. MSJ at 21, citing
12 undisputed facts nos. 59, ECF No. 77.) During the relevant time period, plaintiff refused
13 psychiatric medication designed to alleviate his depression and anxiety. (Defs. MSJ at 21, citing
14 undisputed facts nos. 49, 61, 69, ECF No. 77.) At the second IDTT meeting, defendant Levin
15 offered plaintiff in-cell coping skills worksheets, to which plaintiff responded, "Is that supposed
16 to be good enough?" Plaintiff refused the offer of in-cell materials. (Defs. MSJ at 21, citing
17 undisputed fact no. 201, ECF No. 77.)

18 Defendants argue that during the first half of his treatment in the PIP, plaintiff remained
19 on one-on-one observation, inside his cell, due to self-injurious behaviors and because he
20 persistently expressed suicidal ideation. (Defs. MSJ at 21, citing undisputed fact no. 60, ECF No.
21 77.) This Court observes that defendants presented evidence demonstrating that plaintiff was
22 removed from one-on-one status on or around September 17, 2019. (See Undisputed Fact No.
23 138.) Defendants contend that while plaintiff was on one-on-one observation, plaintiff could not
24 attend groups because he could not commit to personal safety. (Defs. MSJ at 21-22, citing
25 undisputed facts nos. 71, 199, ECF No. 77; see also nos. 70, 198.) This Court observes that
26 defendants present evidence showing that plaintiff attended his first group therapy meeting on
27 September 18, 2019, after he was removed from one-on-one observation. (See ECF No. 77-5 at
28 336.)

Regarding defendant Levin, defendants argue that the undisputed evidence shows that defendant Levin was not involved in plaintiff's mental health treatment in any substantive way, other than attending weekly IDTTs and updating plaintiff's mental health records. Defendants argue that it is undisputed that defendant Levin was never plaintiff's MHPC and her interactions with plaintiff were limited to seeing plaintiff during the weekly IDTTs. (Defs. MSJ at 22, citing undisputed facts nos. 189-191, ECF No. 77.)

C. Plaintiff's Opposition

1. Preliminary Matters

Plaintiff's opposition contains four documents. First, plaintiff filed a document titled "Plaintiff's Statement of Disputed Factual Issues." (ECF No. 81.) In this pleading, plaintiff identifies twelve issues to be decided: 1) whether plaintiff received adequate mental health care while housed in the PIP; 2) whether CHCF-PIP or CDCR ever approved its compliance with the Americans with Disabilities Act ("ADA") and ARP;⁴ 3) whether it was clear to defendants that they were unable to meet their obligations to provide adequate mental health care services to plaintiff; 4) whether defendants' ineffective system of hiring appropriate staffing led to a staff culture that condoned abuse and retaliation against plaintiff; 5) whether the court-appointed special master's audit team was appointed to monitor CHCF-PIP's implementation of their plan to reform the medical and mental health services, discipline, policies and procedures⁵; 6) whether defendants or CDCR's hiring authorities were in compliance with the remedial order and injunction which incorporates the ADA's anti-discrimination and access provisions⁶; 7) whether defendants were deliberately indifferent to plaintiff's medical and mental health needs from August 27, 2019 through November 26, 2019; 8) whether CHCF-PIP administrator's inability to appropriately staff its facilities created a hazardous and inhumane environment for plaintiff;

⁴ This Court does not know what "ARP" refers to.

⁵ Plaintiff's reference to a special master appears to be to the Special Master appointed in the Coleman class action to oversee remediation of the constitutional deficiencies in California's prison mental healthcare system. See Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 900 (E.D. Cal. 2009).

⁶ Plaintiff's reference to remedial orders appears to be a reference to orders issued in the Coleman class action.

1 9) whether defendants are immune under the ADA and Rehabilitation Act; 10) whether
2 defendants and CHCF-PIP administrators were in contempt of the district court orders based on
3 their failure to appropriately staff the medical and mental health care services; 11) whether
4 defendants provided plaintiff with the obligated broad range of mental health services, as defined
5 in California Code of Regulations title 15, § 3360(2); and 12) whether defendants had appropriate
6 staffing to facilitate or assess the mental health needs of the prison population. (*Id.* at 1-3.)

7 As discussed above, the Court ordered that only plaintiff's Eighth Amendment claims
8 raised in the second amended complaint against defendants Kieu, Lundgren and Levin that are
9 based on the claims raised in grievance no. CHCF-HC-20-000548 may proceed. (*See* ECF No.
10 49 at 3.) Therefore, plaintiff's references in his statement of issues to alleged violations of the
11 ADA, the Rehabilitation Act and Title 15, the alleged failure to observe court-ordered remedial
12 orders in the Coleman class action, claims based on allegations not raised in grievance no. CHCF-
13 HC-20-000548, and any legal authority other than the Eighth Amendment, are disregarded. In
14 addition, plaintiff's reference in his statement of issues to Eighth Amendment claims other than
15 those on which this action proceeds are disregarded.

16 Attached to "Plaintiff's Statement of Disputed Factual Issues" are various exhibits. (ECF
17 No. 81 at 5-45.) The Court discusses these exhibits below.

18 Plaintiff's second document filed in support of his opposition is a declaration by plaintiff.
19 (ECF No. 81-1 at 2-6.) Following plaintiff's declaration is a points and authorities. (*Id.* at 7-12.)
20 Plaintiff's third document filed in support of his opposition is a pleading titled, "Brief in
21 Opposition to Defendants' Summary Judgment Motion." (ECF No. 81-2.) Plaintiff's fourth
22 document filed in support of his opposition is a pleading titled, "Memorandum of Points and
23 Authorities." (ECF No. 81-3.)

24 2. Plaintiff's Evidence Attached to Plaintiff's Statement of Disputed Factual Issues

25 Most of the evidence attached to plaintiff's Statement of Disputed Facts is related to
26 events occurring after September 11, 2019. Plaintiff's evidence regarding events occurring after
27 September 11, 2019 is disregarded because it is not relevant to the claims on which this action
28 proceeds.

Attached to plaintiff's Statement of Disputed Factual Issues is a document titled "Executive Summary." (ECF No. 81 at 9.) This document states that the Office of the Inspector General ("OIG") completed the cycle 5 medical inspection of CHCF in February 2019. (*Id.*) In discussing the timing of the inspection, this document states:

The vast majority of our inspection findings were based on CHCF's health care delivery between February 2017 and December 2017. Our policy compliance inspectors performed an onsite inspection in November 2017. After reviewing the institution's health care delivery, our case review performed an onsite inspection in October 2018 to follow up on their initial findings.

(*Id.*)

The OIG experts "made a considered and measured opinion that the overall quality of health care at CHCF was inadequate." (*Id.*) A page from this report states, "We do not reasonably expect a severely understaffed institution to provide adequate care." (*Id.* at 44.)

In his declaration submitted in support of the opposition, plaintiff makes statements that generally restate the allegations in the second amended complaint. (ECF No. 81-1 at 3-6.)

D. Analysis

1. Claim Alleging Denial of Access to Mental Health Services Due to Staff Shortages, etc. between August 27, 2019 and September 11, 2019

As discussed above, in the summary judgment motion, defendants acknowledge plaintiff's claim alleging that plaintiff was denied the ability to participate in a broad range of mental health services due to staff shortages, overcrowding and an increase in violence. In the section of the summary judgment motion addressing the merits of plaintiff's claims, defendants do not directly address this claim. However, defendants argue that plaintiff had access to adequate mental health care. Defendants' undisputed evidence demonstrates that during the relevant time period, plaintiff was on one-on-one status, so plaintiff was not permitted to attend group therapy because he could not commit to personal safety. (Defendants' undisputed facts nos. 70, 71, 198, 199.) Defendants' undisputed evidence demonstrates that during the relevant time period, plaintiff met weekly with the IDTT. (Defendants' undisputed fact no. 28.) Defendants' undisputed evidence demonstrates that during the relevant time period, plaintiff was non-compliant with his psychotropic medication regimen. (Defendant undisputed facts nos. 49, 61, 69.) Defendants'

1 undisputed evidence demonstrates that during the relevant time period, plaintiff was offered in-
2 cell coping materials. (Defendants' undisputed Fact No. 201.) Defendants' undisputed evidence
3 also indicates that during the relevant time period, plaintiff had access to individual therapy.
4 (Defendants' undisputed fact no. 69.)

5 In the opposition, plaintiff presents evidence that CHCF was understaffed in 2017.
6 However, plaintiff presents no evidence demonstrating that plaintiff was denied access to mental
7 health treatment between August 27, 2019 and September 11, 2019 due to understaffing,
8 overcrowding or an increase in violence, as alleged in the second amended complaint. Plaintiff
9 also fails to identify any specific mental health treatment he failed to receive between August 27,
10 2019 and September 11, 2019 due to understaffing, overcrowding or an increase in violence.

11 Based on the undisputed evidence discussed above, this Court finds that there is no
12 evidence supporting plaintiff's claim that plaintiff was denied access to mental health treatment
13 between August 27, 2019 and September 11, 2019 due to understaffing, overcrowding or an
14 increase in violence. Accordingly, defendants should be granted summary judgment as to this
15 claim.

16 2. Claims Against Defendant Kieu Only

17 In the second amended complaint, plaintiff alleges that from August 27, 2019 through
18 September 11, 2019, defendant Kieu confined plaintiff in his cell without any set treatment plan.
19 This Court finds that defendants' undisputed evidence demonstrates that defendant Kieu prepared
20 a set treatment plan for plaintiff, with clear goals and expectations, two days after plaintiff arrived
21 in the CHCF PIP. Defendants' undisputed evidence also demonstrates that plaintiff's treatment
22 plan was regularly updated after each weekly IDTT. (See Undisputed Facts Nos. 28, 50-51, 57-
23 59, 70.)

24 Although defendants did not directly address plaintiff's claim that he was confined in his
25 cell from August 27, 2019 through September 11, 2019, defendants' statement of undisputed facts
26 contains evidence regarding this claim. Defendants presented undisputed evidence demonstrating
27 that plaintiff could not attend group therapy from August 27, 2019 until on or around September
28 17, 2019 due to plaintiff's self-injurious behaviors and because plaintiff persistently expressed

1 suicidal ideation. (See undisputed fact no. 138.)

2 While defendants argue that plaintiff was confined to his cell during one-on-one
3 observation, this argument is not supported by the evidence. While plaintiff was not allowed to
4 attend group therapy while on one-on-one observation due to plaintiff's failure to commit to his
5 own personal safety, defendants' evidence demonstrates that plaintiff was allowed to leave his
6 cell during one-on-one observation when plaintiff was supervised by CHCF staff. For example,
7 defendants' evidence demonstrates that plaintiff left his cell to attend weekly IDTT meetings
8 while he was on one-on-one observation. Defendants also presented evidence that plaintiff
9 attended confidential meetings with defendant Kieu, presumably outside of plaintiff's cell, while
10 plaintiff was on one-on-one observation. (See undisputed facts nos. 63, 69.) While the extent to
11 which plaintiff left his cell while on one-on-one observation is not clear, the undisputed evidence
12 demonstrates that plaintiff was not entirely confined to his cell from August 27, 2019 to
13 September 11, 2019.

14 In his opposition, plaintiff presents no evidence supporting his claims that he was
15 confined to his cell from August 27, 2019 through September 11, 2019 and that defendant Kieu
16 failed to develop a treatment plan for plaintiff. As discussed above, defendants' undisputed
17 evidence demonstrates that defendant Kieu developed a treatment plan. Defendants' undisputed
18 evidence also demonstrates that the extent of plaintiff's confinement to his cell between August
19 27, 2019 and September 11, 2019 was based on plaintiff's mental health needs, which does not
20 amount to deliberate indifference. For these reasons, defendant Kieu should be granted summary
21 judgment as to these claims.

22 3. Claims Against Defendant Levin Only

23 In the second amended complaint, plaintiff alleges that from August 28, 2019 through
24 September 11, 2019, during each of plaintiff's IDTT sessions, defendant Levin told plaintiff that
25 it was not her job to run therapeutic groups when plaintiff asked for such services. In this claim,
26 plaintiff appears to allege that defendant Levin violated the Eighth Amendment by denying
27 plaintiff's requests to attend therapeutic groups between August 28, 2019 and September 11,
28 2019. This Court finds that defendant Levin did not act with deliberate indifference when she

1 allegedly denied these requests because it is undisputed that plaintiff was not permitted to attend
2 group therapy during that time because plaintiff was on one-on-one status based on plaintiff's
3 inability to commit to his personal safety. For this reason, defendant Levin should be granted
4 summary judgment as to this claim.

5 4. Claims Against Defendant Lundgren Only

6 In the second amended complaint, plaintiff alleges that defendant Lundgren refused to
7 remove plaintiff from his cell on September 11, 2019 so that plaintiff could write letters.
8 Although defendants do not directly address this claim, defendants' statement of undisputed facts
9 contains evidence regarding this claim. This Court observes that on September 11, 2019,
10 defendant Lundgren checked on plaintiff and the availability of in-cell coping materials. (See
11 undisputed fact no. 155.) In her declaration, defendant Lundgren states that during the September
12 11, 2019 cell-side check, plaintiff told her that he wanted to come out of his cell for group
13 therapy. (ECF No. 77-5 at 4.) As discussed above, plaintiff was not permitted to attend group
14 therapy on September 11, 2019 because plaintiff was on one-on-one status. Therefore, to the
15 extent plaintiff claims that defendant Lundgren refused to remove plaintiff from his cell to attend
16 group therapy on September 11, 2019, this claim is without merit because plaintiff was not
17 allowed to attend group therapy at that time.

18 This Court observes that in the second amended complaint, plaintiff alleges that on
19 September 11, 2019, defendant Lundgren denied plaintiff's request to leave his cell to write
20 letters. Defendants provided a record by defendant Lundgren stating that she met with plaintiff
21 cell-side on September 12, 2019. (ECF No. 77-5 at 210.) Defendant Lundgren wrote, "Pt.
22 presented as argumentative and entitled requesting to come out of his cell to write letters with this
23 writer. This writer instructed pt if he needs help writing, pt's 1:1 or floor staff are available to
24 help him." (Id.) While defendant Lundgren may have denied plaintiff's request to leave his cell
25 to write letters on September 12, 2019, there is no record that defendant Lundgren denied a
26 request made by plaintiff on September 11, 2019 to leave his cell to write letters.

27 Plaintiff offers no evidence supporting his claim that defendant Lundgren violated the
28 Eighth Amendment by denying his request to leave his cell on September 11, 2019. Accordingly,

defendant Lundgren is entitled to summary judgment as to this claim.

5. Qualified Immunity

Defendants argue they are entitled to qualified immunity. (Defs. MSJ at 23-25, ECF No. 77.)

a. Legal Standards

“The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity shields an officer from liability even if his or her action resulted from “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.” Id. (internal quotation marks and citation omitted).

“Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the official’s conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case.” Robinson v. York, 566 F.3d 817, 821 (9th Cir. 2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). A right is “clearly established” when, “at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that ‘every reasonable official would [have understood] that what he is doing violates that right.’” Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

b. Analysis

Defendants move for qualified immunity on the grounds that the undisputed facts demonstrate they did not violate plaintiff’s Eighth Amendment rights and because it would not have been clear to a reasonable official in defendants’ positions that their treatment of plaintiff violated clearly established law. “Because the Court has found that there is no genuine issue of material fact to support plaintiff’s claims, ‘there is no necessity for further inquiries concerning qualified immunity.’” Los Angeles Cnty. v. Rettele, 550 U.S. 609, 616 (2007) (quoting Saucier,

533 U.S. at 201). Thus, the Court declines to address the issue of qualified immunity .

E. Discussion Regarding Claim for Ongoing Violations

As discussed above, this action proceeds on plaintiff's claim alleging denial of access to mental health treatment between August 27, 2019 and September 11, 2019 due to understaffing, overcrowding and an increase in violence, which was administratively exhausted in grievance no. CHCF-HC-20-000548. As discussed above, defendants' undisputed evidence demonstrates that plaintiff was denied access to group therapy prior to his release from one-on-one status because plaintiff could not commit to his personal safety. In the opposition, plaintiff presents evidence demonstrating that he may have been denied access to group therapy on occasion due to understaffing after his release from one-on-one status on or around September 17, 2019. (ECF No. 81 at 15, 17, 25, 26.) In Sheltra v. Christensen, 2024 WL 5250273, *7 (9th Cir. Dec. 31, 2024), the Ninth Circuit recently held that under the continuing-violations doctrine, a properly exhausted prison grievance asserting "one, continuing harm or a single course of conduct" can exhaust events arising out of the same alleged violation that occur after the grievance was made. Assuming the holding of Sheltra v. Christensen applies to pending actions, this Court finds that grievance no. CHCF-HC-000548 did not administratively exhaust plaintiff's claim alleging denial of access to group therapy due to understaffing after plaintiff's release from one-on-one status. Because plaintiff was allegedly denied access to group therapy for different reasons before and after his release from one-on-one status, grievance no. CHCF-HC-000548 did not administratively exhaust plaintiff's claim alleging denial of access to group therapy due to understaffing after plaintiff's release from one-on-one status.

VII. REMAINING MATTERS

A. Plaintiff's Motion for Appointment of Counsel

District courts lack authority to require counsel to represent indigent prisoners in section 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney to voluntarily represent such a plaintiff. See 28 U.S.C. § 1915(e)(1); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether "exceptional

1 circumstances” exist, the court must consider plaintiff’s likelihood of success on the merits as
2 well as the ability of the plaintiff to articulate his claims pro se in light of the complexity of the
3 legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court did not
4 abuse discretion in declining to appoint counsel). The burden of demonstrating exceptional
5 circumstances is on the plaintiff. Id. Circumstances common to most prisoners, such as lack of
6 legal education and limited law library access, do not establish exceptional circumstances that
7 warrant a request for voluntary assistance of counsel.

8 Because this Court recommends that defendants’ summary judgment motion be granted,
9 plaintiff’s motion for appointment of counsel (ECF No. 79) is denied.

10 **B. Defendants’ Motion to Strike Plaintiff’s Sur-Reply**

11 Following the filing of defendants’ reply to plaintiff’s summary judgment opposition, on
12 June 6, 2024 plaintiff filed a pleading titled “Plaintiff’s Declaration in Reply of Defendants’
13 Motion for Summary Judgment.” (ECF No. 86.) On June 13, 2024, defendants filed a motion to
14 strike plaintiff’s pleading filed June 6, 2024 as an impermissible sur-reply. (ECF No. 87.)

15 The Local Rules provide for a motion, an opposition, and a reply. See E.D. Cal. L.R.
16 230(l). There is nothing in the Local Rules or the Federal Rules that provides the right to file a
17 sur-reply. The court generally views motions for leave to file a sur-reply with disfavor. See Hill
18 v. England, 2005 WL 3031136, at *1 (E.D. Cal. Nov. 8, 2005) (citation omitted). However,
19 district courts have the discretion to either permit or preclude a sur-reply. See JG v. Douglas
20 County School Dist., 552 F.3d 786, 803 n.14 (9th Cir. 2008) (district court did not abuse
21 discretion in denying leave to file a sur-reply where it did not consider new evidence in reply).

22 Plaintiff did not seek leave to file a sur-reply. In addition, plaintiff failed to file an
23 opposition to defendants’ motion to strike addressing why he should be granted leave to file a sur-
24 reply. This Court finds no good cause to permit plaintiff to file the sur-reply. In addition,
25 permitting plaintiff to file the sur-reply would require granting defendants leave to respond to the
26 sur-reply, further delaying resolution of defendants’ summary judgment motion. For these

27 ////

28 ////

reasons, defendants' motion to strike plaintiff's sur-reply is granted.⁷

VIII. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for appointment of counsel (ECF No. 79) is denied; and

2. Defendants' motion to strike plaintiff's sur-reply (ECF No. 87) is granted.

IT IS HEREBY RECOMMENDED that defendants' summary judgment motion (ECF No. 77) be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: January 15, 2025


CHI SOO KIM
UNITED STATES MAGISTRATE JUDGE

Ardds133.57

2

⁷ Plaintiff's sur-reply consists of legal argument and contains no new evidence. (ECF No. 86.)